Michael K. Jeanes, Clerk of Court
*** Filed ***
10/23/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000351-001 DT 10/22/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
K. Waldner
Deputy

RUSK MASIH

RUSK MASIH
6289 W LOUISE DR
GLENDALE AZ 85310

v.

ARROWHEAD RANCH PROPERTY OWNERS ASSOCIATION PHASE III INC (001)

LYDIA P LINSMEIER

MANISTEE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case No. CC2011–203654.**

Defendant-Appellant Arrowhead HOA (Defendant) appeals the Manistee Justice Court's determination finding it liable for improperly assessing a fine against Plaintiff. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

This matter stemmed from an ongoing dispute between Plaintiff—a homeowner in an HOA—and the HOA. Three defendants were originally sued: Ms. Welchlin, Mr. Mountan, and the HOA[1]. All Defendants were represented by the same law firm. This appeal was brought by the HOA. Originally, the HOA claimed the homeowner violated the CC&Rs by failing to maintain his lawn and trim his fig tree. The HOA ostensibly informed Plaintiff—by letter dated June 28, 2011,—that it had imposed a $50.00 fine which would remain if the Plaintiff did not submit a written appeal. Plaintiff submitted a written appeal and attended an HOA Board of Directors Executive Session to appeal this fine. After an August 24, 2011, hearing on the alleged violation, the HOA determined Plaintiff could trim the fig tree in December or January and the HOA would waive any assessed $50.00 fine at that time.

[1] The HOA will be referred to as Defendant throughout this opinion. It is the only defendant to challenge the trial court's rulings.

Thereafter, on October 17, 2011, Plaintiff filed a complaint in the Small Claims division of the Arrowhead Justice Court alleging (1) false accusations; (2) insult for telling him to leave the area; and (3) an unspecified claim about "ignoring my [sic] constitutional right to live anywhere I want to live." Plaintiff sued several defendants in this lawsuit: (1) Sherry Welchlin; (2 Harold Mountan, President of the Homeowners [sic] Association; and (3) Arrowhead Ranch—Phase III. Plaintiff requested damages of $1,730.00.

On November 14, 2011, at Defendants' behest, the case was transferred from the Small Claims Division to the Civil division of the Justice Court. Each defendant—the HOA and co-defendants Welchlin and Mountan—filed a separate Motion To Dismiss on November 18, 2011.

On November 25, 2011, the trial court set the matter for a mediation hearing. The parties were instructed that:

> The mediation hearing is for the purpose of assisting parties in settling their dispute outside the courtroom. Mediators will be present to assist in the settlement discussion. Any agreement entered into will be by consent of all parties.
>
> Please pay attention to Paragraphs 5 and 8. Failure to comply with these directives will have adverse consequences to your case.

The cautionary paragraph referencing paragraphs 5 and 8 were printed in bold type. Paragraph 5 advises litigants of the consequences of failing to appear. As part of the caution, the parties were warned that failure to appear at mediation could result in sanctions for wasting court resources. In addition, the warning specifically stated:

> Failure to appear at the scheduled Mediation Conference by the Defendant(s) may result in the issuance of a Default Judgment.

Paragraph 8 informed all parties that the real party-in-interest needed to be present.

On December 12, 2011, Plaintiff moved for default judgment against Defendant and co-Defendant Mountan. The three defendants opposed this motion on December 13, 2011, and claimed they had responded by filing motions to dismiss. On December 23, 2011, the trial court denied Plaintiff's request for a default judgment against co-Defendant Mountan.

On December 23, 2011, Defendant and co-Defendant Welchlin filed a joint Motion For Summary Disposition, re-urging the trial court to dismiss Plaintiff's claim for failing to respond to the initial Motions to Dismiss. On January 4, 2012, the trial court denied Defendant's Motion to Dismiss. That same day, Defendants filed their Second Motion for Sanctions. The trial court granted that Motion on January 25, 2012—Exhibit 23—but did not include any sanction within its ruling. On January 11, 2012, the trial court granted the Welchlin Motion to Dismiss—thus removing her from the case.

On January 17, 2012, Plaintiff filed a Motion requesting Mr. Mountan and Ms. Welchlin be present at the mediation meeting scheduled for Feb. 14, 2012. Defendant opposed this motion on January 23, 2012, and claimed in "Defendants' Response to Plaintiff's Motion To Have Sherry

Welchlin and Harold Mountan At Mediation[2]" that (1) Ms. Welchlin had been dismissed from the case on January 11, 2012, and (2) the court had no jurisdiction over Mr. Mountan. Defendants asked the trial court to either clarify its January 11, 2012, order or dismiss the case against Mr. Mountan. Defendant further requested that the trial court vacate the mediation scheduled for Feb. 14, 2012. The trial court denied Plaintiff's Motion to have Ms. Welchlin and Mr. Mountan at the mediation but did not grant any of Defendant's other requests.

On January 25, 2012, Plaintiff filed a Motion To Reconsider the court's order denying Plaintiff's request that Ms. Welchlin and Mr. Mountan be ordered to attend mediation. On January 25, 2012, the trial court also considered Defendants' joint Motion For Summary Disposition and signed an order reading "moot—dismissed on 1–11–12." The only defendant listed on the order was Sherry Welchlin. The court file does not show that Defendant sought clarification of this order even though its name was not listed as one of the parties.

On February 7, 2012, Defendant and co-Defendants Welchlin and Mountan sought an award of their attorneys' fees in the amount of $2,525.00. In the memorandum attached to this request the parties alleged:

> All the Defendants filed motions to dismiss, and the Court granted them. Defendants are the prevailing parties and entitled to an award of their reasonable attorney fees and costs.

In making this assertion, Defendant ignored the trial court's earlier—January 4, 2012,—ruling denying Defendant its requested Motion To Dismiss.

Defendant failed to attend the scheduled February 14, 2012, mediation conference. Thereafter, on February 22, 2012, Defendant requested a default judgment against Defendant. The trial court granted the default judgment on February 27, 2012, and awarded Defendant court costs of $51.00 plus damages of $1,730.00. On March 2, 2012, Defendant responded to the request for default and on March 15, filed a Motion To Vacate Judgment.[3] The premise of Defendant's Motion To Vacate Judgment was (1) Plaintiff had abused the legal system by confusing the record and (2) Plaintiff "let Arrowhead Ranch's counsel believe the case was dismissed and Arrowhead Ranch did not need to attend the mediation." Defendant also asserted entry of judgment was an excessive sanction for "an honest error." The trial court denied this motion on April 3, 2012

Defendant filed a timely appeal and Plaintiff filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

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. . . . .

[2] Exhibit 25.
[3] Exhibit 36.

II. ISSUES:

*A. Did The Parties Properly Present Their Issues On Appeal.*

Defendant submitted an appellate memorandum that disregards the Superior Court Rules of Appellate Procedure—Civil (SCRAP—Civ.) about page limitations. Accordingly, Defendant's appellate memorandum failed to comply with Rule 8(a)(4), Super. Ct. R. App. P.—Civil, (SCRAP—Civ.) which states:

> Memoranda shall be typed or printed, single sided, on 8.5 by 11 inch white paper. Text shall be double spaced except for quotations. Exclusive of any appendices, memoranda shall not exceed 15 pages. Memoranda that are not legible may be stricken by the Superior Court. Other Superior Court local rules as to format, character size, and margins shall otherwise apply.

Defendant did not request any additional pages. Instead they filed a 19 page memorandum with 43 exhibits attached. This Court notes that Defendant used larger sized fonts than mandated.

Plaintiff also failed to comply with the mandated rules. Plaintiff submitted an appellate memorandum that omitted specific reference to legal authority. Consequently, Plaintiff's appellate memorandum failed to comply with Rule 8(a)(3) SCRAP—Civ., which states:

> Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

Defendant also failed to specifically reference legal authority for much of its appellate memorandum. For example, Defendant asserted—in its appellate memorandum at page 14—that its failure to attend the mediation occurred "through accident that could not have been prevented by ordinary prudence." Defendant then asserted that Plaintiff's "misconduct has directly contributed to a miscarriage of justice." Defendant provided no support for its claim of "accident that could not have been prevented by ordinary prudence" and this Court does not know to what accident Defendant refers. Similarly, Defendant failed to support its claim about a miscarriage of justice.

Merely mentioning a claim is insufficient. "In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim." *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). The appellate court is "not required to assume the duties of an advocate and search voluminous records and exhibits to substantiate a party's claim," *Adams v. Valley National Bank*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (Ct. App. 1984). Furthermore, unless there is fundamental error, allegations that lack specificity or reference to the record usually do not warrant consideration on appeal. *State v. Cookus*, 115 Ariz. 99, 104, 563 P.2d 898, 903 (1977).

However, SCRAP—Civ. Rule 8(a)(5) provides the Superior Court may "modify or waive the requirements of this rule to insure a fair and just determination of the appeal." Although (1) the format for Defendant's memorandum does not comply with the strict letter of the rules; (2) Plaintiff completely failed to support his memorandum with legal authority; and (3) Defendant failed to support portions of its memorandum with legal authority, this Court has determined that—in order to insure a fair and just determination of the appeal—this Court will waive strict compliance with SCRAP—Civ. Rules 8(a) (3) and 8(a)(4).

*B. Did The Trial Court Abuse Its Discretion By Denying Plaintiff's Motion To Dismiss For Failing To State A Claim.*

Defendant maintained Plaintiff failed to state a legally cognizable claim in his complaint. In reviewing Plaintiff's complaint and its attachment—which was incorporated into the complaint by reference—if appears Plaintiff—inartfully—raised a complaint about fraud as well as the intentional infliction of emotional distress. Plaintiff alleged Defendant—and co-defendants Welchlin and Mountan—attempted to take money from him by issuing false accusations. Plaintiff alleged:

> Here is the reason I am taking you to the court:
>
> 1. Fine Without Proven Violation
>
> You have attempted to take money from me by issuing false accusations. You used accounting gimmick [sic] for that purpose by sneaking $50 [sic] as balance forward and adding it to the quarterly homeowner's association fee, without identifying such item.
>
> This kind of accounting and the behavior preceded [sic] it, proved that your intention is just to take money by making false accusations as described below. Such behavior cost me money, time and anxiety because you perpetuated different unproven violation [sic] against my property.

Plaintiff included a list of charges he alleged he sustained as a result of Defendants' wrongful acts.

Arizona is a notice pleading state. *Dube v. Likins*, 216 Ariz. 406 , 415 ¶ 26, 167 P.3d 93, 102, ¶ 26 (Ct. App. 2007*). Rowland v. Kellogg Brown and Root, Inc*., 210 Ariz. 530, 533, ¶ 10, 115 P.3d 124, 127, ¶ 10 ( Ct. App. 2005) discussed the minimum standards for a valid complaint and stated:

> But because Arizona is a notice pleading state, a complaint need only have a statement of the ground upon which the court's jurisdiction depends, a statement of the claim showing that the pleader is entitled to relief and a demand for judgment.

The *Rowland, id.,* court continued and cited with approval the holding in *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003) that to withstand a 12(b)(6) A.R.C.P. motion to dismiss, a plaintiff must not—as a matter of law—be entitled to relief under any interpretation of the facts. The court quoted the following relevant language:

> To survive a motion to dismiss for failure to state a claim under Ruled 12(b)(6), a complaint generally must satisfy only the minimal notice pleading requirements of Rule 8(a)(2). [That rule] requires only that the complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief.

*Rowland, id.,* 210 Ariz. at 534, ¶ 15, 115 P.3d at 128, ¶ 15 quoting with approval from *Porter v. Jones, id.,* 319 F.3d at 494. The first page of Plaintiff's complaint indicated the court's jurisdiction.[4] The attachment indicated Plaintiff's basis for bringing the action—which sounded in fraud, emotional distress, and defamation—and requested damages under the heading of "My Demand."[5] Although Defendant has characterized Plaintiff's complaint as a request for a declaratory judgment, Plaintiff's complaint—as inartful as it was—met the minimal standards for avoiding a dismissal pursuant to ARCP Rule 12(b)(6) as it included the required jurisdictional statement, a short plain statement of his claim, and a demand for damages.

In its Motion To Dismiss (Exhibit 5)—p. 2—Defendant alleged Plaintiff failed to allege the name or elements of the tort. Defendant cited no authority in this motion requiring a plaintiff to identify a tort by name. Defendant also alleged—p.2—Plaintiff incurred no damage because Plaintiff did not pay the assessed fine. Defendant provided no support for this assertion about no damage. Furthermore, Defendant's claim about no damages is specifically refuted by the attachment Plaintiff included under the section headed "My Demand." The trial court denied Defendant's Motion To Dismiss which Defendant now claims was an abuse of discretion.

In reviewing the trial court's actions denying Defendant's Motion To Dismiss, this Court must (1) consider the facts as alleged in Plaintiff's complaint to be true and (2) determine if the complaint, when construed "in a light most favorable to the plaintiff" set forth a valid claim. *Goddard v. Fields*, 214 Ariz. 175, 177, ¶ 6, 150 P.3d 262, 264 ¶ 6 (Ct. App. 2007) quoting from *Douglas v. Governing Bd. Of the Window Rock Sch. Dist. No. 8*, 206 Ariz. 344, 346, ¶ 4, 78 P.3d 1065, 1067 (Ct. App. 2003). Generally, review of a trial court's denial of a motion to dismiss is for an abuse of discretion. *Edonna v. Heckman*, 227 Ariz. 108, 109, ¶ 8, 253 P.3d 627, 628 ¶ 8 (Ct. App. 2011).

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[4] Defendant argued jurisdiction over co-Defendant Mountan in the underlying action resulted from the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 78(a). This argument is inapposite here as the co-defendant is not party to this appeal, and Plaintiff asserted jurisdiction using a court approved Small Claims Complaint form. Defendant has not alleged the Court issued form is inappropriate. The form language includes: "The debt, or cause of action, or incident that resulted in this claim, occurred in this precinct at the following location:"

[5] Plaintiff specifically stated: "My Demand [sic] You pay my cost as detailed below, which you inflicted on me by your unjustified action: [sic].

Because appellate courts use an abuse of discretion standard, the appellate courts will view the facts in the light most favorable to upholding the trial court's decision. To determine if the trial court abused its discretion, it is incumbent on this court to first determine the meaning for discretionary conduct. In addressing discretionary conduct, the Arizona Supreme Court stated:

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

*State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). An appellate court does not normally sit as a second chance to retry conflicting factual assertions and does not reweigh the evidence to determine if it would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Here the trial court needed to determine if Plaintiff's complaint met the minimal standards imposed by A.R.C.P Rule 8(a) for a pleading. The trial court found it did. Because this issue required an "assessment of conflicting procedural, factual, or equitable considerations which vary from case to case" rather than a "question . . . of "law or logic"[6] it is not appropriate for this Court to substitute its judgment for that of the trial court. This Court will not look over the shoulder of the trial court when the dispute involves conflicting factual considerations. Because (1) the granting or denying of motions to dismiss are left within the purview of the trial court unless the court abuses its discretion; (2) Defendant failed to show how the trial abused its discretion; and (3) Plaintiff's complaint minimally complied with the requirements for a complaint,[7] this Court finds the trial court did not abuse its discretion in denying Defendant's Motion To Dismiss.

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[6] *State v. Chapple, id.*

[7] Plaintiff's complaint contained (1) a jurisdictional statement on the court-provided form; (2) an allegation of harm caused by the HOA assessing a fine to which it was not entitled as well as an allegation of anxiety or mental distress resulting from Defendant's actions; and (3) a claim for money damages.

*C. Did The Trial Court Abuse Its Discretion By Denying Plaintiff's Motion To Vacate Judgment When Plaintiff Failed To Appear At The Scheduled Mediation On February 14, 2012..*

Defendant alleged confusion and asserted the combination of vexatious litigation and "accident" resulted in his missing the scheduled mediation conference. This Court notes that as of January 23, 2012, Defendant should have been apprised of the mediation. On that date, Defendant filed his "Defendants' Response To Plaintiff's Motion To Have Sherry Welchlin and Harold Mountan at Mediation." In that motion, Defendant asserted Ms. Welchlin had been dismissed from the lawsuit and the trial court lacked jurisdiction over Mr. Mountan. Although Defendant asked that the trial court vacate the mediation, Defendant did not make any allegations about its own presence at the scheduled mediation. By asking the trial court to vacate the scheduled mediation, Defendant indicated it was aware of the mediation as of that date.

The next event to occur was the trial court's ruling on January 25, 2012, on Defendant's Motion For Summary Disposition. Here, the trial court signed an order reading "moot—dismissed on 1–11–12." The only defendant listed on the order was Sherry Welchlin. Defendant alleged in its appellate memorandum—p. 13[8]—that the "Arrowhead Justice Court clerks have a habit of only placing one Defendant on orders." This order is the alleged basis for Defendant's confusion. This Court notes Defendant provided no support for its statement about the Arrowhead Justice Court clerks. If the trial court clerks routinely omit names of parties about whom orders are made, this could pose a problem for litigants.[9] However, if this routinely occurred—as Defendant now argues—Defendant should have been aware of the problem and sought clarification of the trial court's January 25, 2012, order. Defendant apparently failed to do so. Instead, Defendant—according to its appellate memorandum at p. 14—"assumed the denial of the first Motion for Sanctions applied to all both [sic] Defendants and the Appellant." Defendant provided no basis for this assumption and no indication that it tried to check if the scheduled mediation had been cancelled. Defendant's claim also ignores the fact that Defendant's Motion To Dismiss was specifically denied by the trial court on January 4, 2012.

The crux of this case rests on the trial court's order dismissing defendants' joint Motion For Summary Disposition as moot. As stated, the order reads "moot-dismissed on 1–11–12." In fact, only Ms. Welchlin's claim was dismissed on that date and the Order dismissing Ms. Welchlin's case did not indicate if the case against Defendant had also been dismissed. Admittedly the order may have been confusing as the pleading to which it referred was jointly filed by Defendant and co-Defendant Welchlin. However, at the time the trial court ruled, only co-Defendant Welchlin

[8] Defendant did not use pleading paper for its appellate memorandum and did not indicate line numbers in its memorandum. Therefore, all references to Defendant's appellate memorandum shall be limited to the page numbers.
[9] This Court notes that the Rulings on Motion in this case included more than one name on occasion. For example, on the January 11, 2012, Ruling on Motion, two defendants (1) Sherry Welchlin and (2) Harold Mountan; are listed. On the January 18, 2012, Ruling on Motion, the Defendants are listed as Sherry Welchlin & Harold Mountan. Both Sherry Welchlin and Harold Mountan are listed as the defendants on the trial court's January 31, 2012, Ruling on Motion.

was listed as having been dismissed from the case. Defense counsel and Defendant knew—or should have known—of the procedural posture of the case. If Defendant was confused by the trial court's January 25, 2012, order, it was Defendant's obligation to seek clarification of this order.

This Court notes Defendant alleged it was one of the prevailing parties in its February 7, 2012, request for attorneys' fees despite the trial court having specifically denied its Motion to Dismiss on January 4, 2012.[10] Defendant's action substantiates its claim that it was confused. However, the trial court's January 4, 2012, Order should have alerted Defendant to (1) calendar future events and (2) check to see if the mediation had been cancelled. Defendant failed to do this. Instead, Defendant relied on the ruling Defendant may have believed it had rather than the ruling it actually obtained.

On March 15, 2012, Defendant filed a Motion To Vacate Judgment.[11] The premise of Defendant's Motion To Vacate Judgment was (1) Plaintiff had abused the legal system by confusing the record and (2) Plaintiff "let Arrowhead Ranch's counsel believe the case was dismissed and Arrowhead Ranch did not need to attend the mediation." Defendant also asserted entry of judgment was an excessive sanction for "an honest error." Defendant misstated what occurred. While Defendant—and/or defense counsel—may have been confused, it was not the result of Plaintiff's doing. Plaintiff did nothing to cause or "let" defense counsel (1) believe the case was dismissed and (2) did not need to attend the mediation. Here, Defendant did nothing more than attempt to shift the trial court's focus from Defendant's responsibility for the error to Plaintiff. It was the trial court which made the ruling which lies at the heart of Defendant's confusion. Plaintiff had no obligation to inform Defendant or defense counsel what the trial court's ruling meant or might have meant. If Defendant and/or counsel were confused, it was their obligation to get the order clarified. Apparently Plaintiff was not confused by the court's order and Plaintiff attended the mediation.

Nonetheless, this Court recognizes Defendant and counsel could have been confused by the trial court's January 25, 2012, order—particularly because the motion which resulted in the order was jointly filed but the specific ruling only listed one of the parties on the order. Consequently, this Court must grapple with the effect of Defendant (1) failing to seek clarification of the confusing order and—instead—(2) relying on what Defendant believed the Order said. It is clear Defendant (1) believed the Plaintiff's claim was meritless and (2) wanted the case to end. The real question is whether Defendant's confusion rises to the level of excusable neglect warranting relief by the appellate court.

This Court must consider if the trial court abused its discretion when it ruled against Defendant after Defendant alleged it failed to attend the scheduled mediation because Defendant

[10] The only Defendant listed on the January 4, 2012, Ruling on Motion denying the Motion to Dismiss is Arrowhead Ranch Property. This Court notes that a second Ruling on Motion was prepared the same day—January 4, 2011,—granting a Motion To Dismiss for Harold Mountan.
[11] Exhibit 36.

believed the case had been dismissed in its entirety. Defendant's failure to appear resulted in Plaintiff obtaining a default judgment for the entire amount Plaintiff claimed. Plaintiff provided no proof about the damages he claimed he sustained as a result of Defendant's actions. In *Hilgeman v. American Mortg. Securities, Inc*. 196 Ariz. 215, 994 P.2d 1030 (Ct. App. 2000), the Arizona Court of Appeals determined that although it is highly desirable to decide cases on their merits, the appellate court reviews the trial court's refusal to set aside a default for a "clear abuse of discretion." *Hilgeman, id.*, continued a history of precedential holding that setting aside a default lies within the sound discretion of the trial court. See *Thomas v. Goettl Bros. Metal Products, Inc.*, 76 Ariz. 54, 57, 258 P.2d 816, 817 (1953) and *Prell v. Amado*, 2 Ariz. App. 35, 36, 406 P.2d 237, 238 (Ct. App. 1965). When considering a trial court's ruling on a motion to set aside a default judgment, the reviewing court reviews the facts in the light most favorable to upholding the trial court's determination. *Ezell v. Quon*, 224 Ariz. 532, ¶ 2, 233 P.3d 645 ¶ 2 (Ct. App. 2010).

To determine if the trial court abused its discretion, this court must decide if the trial court had substantial evidence to support its decision. This Court believes the trial court did have substantial evidence to refuse to set aside the default judgment. Defendant failed to timely appear for his scheduled hearing and (1) did not properly advise the court he was unable to appear; (2) did not ask for clarification of the trial court's orders when—according to Defendant's claim—it was apparent that the trial court did not always indicate which litigant was covered by a particular order; and (3) an earlier trial court order specifically denied Defendant's Motion To Dismiss.

In *Walter v. Kendig*, 107 Ariz. 510, 513, 489 P.2d 849, 852 (1971) the Arizona Supreme Court quoted with approval from an earlier Arizona case, *In re Welisch*, 18 Ariz. 517, 521–22, 163 P. 264, 265–66 (1917) a definition of judicial discretion.[12]

> "Discretion" of court is a liberty or privilege allowed to a judge, within the confines of right and justice, to decide an act in accordance with what is fair, equitable, and wholesome, as determined by the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law, to be exercised in accordance with a wise, as distinguished from a mere arbitrary, use of power, and under the law.

The Supreme Court continued and stated:

> Our courts exist for the purpose of providing an effective and fair tribunal in which parties to a dispute may resolve their grievances. An order which in effect grants judgment by default without regard to the merits of a case is a harsh order and justified only in circumstances where no reasonable excuse is present.

*Walter v. Kendig, id.*, 107 Ariz. at 513, 489 P.2d at 852.

[12] The Arizona Supreme Court in *In re Welisch* quoted from Words and Phrases, 2d, vo. 2. Page 4.

The discretion to grant relief from a default judgment involves the balancing—in each case—of the competing legal principles of (1) finality of judgment as opposed to (2) resolution on the merits. *Addison v. Cienega, Ltd*., 146 Ariz. 322, 323, 705 P.2d 1373, 1374 (Ct. App. 1985). Here, Defendant claimed the harsh remedy of default is unwarranted because Defendant acted as a reasonable defendant in believing the case had been dismissed in its entirety despite a court order omitting Defendant's name as one of the covered parties. In essence, Defendant claimed any neglect on its part was or should have been excusable because (1) the press of the pleadings in the case (2) coupled with the trial court's order would have confused a reasonable Defendant.

The test for excusable neglect is whether the neglect is "such as might be the act of a reasonably prudent person under the same circumstances." *State ex rel Husky v. Oaks*, 3 Ariz. App. 174, 277, 412 P.2d 743, 746 (Ct. App. 1966). *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163, 871 P.2d 698, 710 (App.1993). Defendant failed to demonstrate that its failure to attend a scheduled hearing is the act of a reasonably prudent litigant under similar circumstances. Here, Defendant received notice of the mediation accompanied by a warning that failure to attend might result in the trial court granting Plaintiff a default judgment. Defendant was represented by counsel. Counsel either knew or should have known of the importance of appearing at scheduled court appearances and of the need to check if a court appearance has been canceled before failing to appear. Although counsel argued his failure to appear was the result of confusion, attorneys are charged with knowing the importance of checking on their mandated appearances for conferences and hearings. The mediation conference was never vacated. The trial court had denied Defendant's motion to dismiss. While the trial court's January 25, 2012, order may have been confusing, counsel needed to check on this appearance before ignoring this obligation. This Court finds that a reasonable litigant who believed its case had been dismissed but had not received specific notice of the dismissal on an order with that litigant's name would contact the court and ask if future court appearances had been canceled. Counsel's failure to do so may have been neglect but it was not excusable neglect. Defendant did not assert it ever attempted to find out if the mediation had been canceled.

Here, the trial court refused to set aside the default. When discussing the ability of trial courts to refuse to set defaults aside, the Arizona Supreme Court had this to say:

> To say that in the instant case the wise and judicious course would have been followed by setting aside the default judgment, insuring that the controversy would have been determined on its merits, is not equivalent to saying that the refusal was an act of abuse or arbitrariness.

*Thomas v. Goettl Bros. Metal Products, Inc., id.*, 76 Ariz. at 57–58, 258 P.2d at 818. In *Christy A. v. Arizona Dept. of Econ. Sec.*, 217 Ariz. 299, 304-05, 173 P.3d 463, 468-69 (Ct. App. 2007) the Arizona Court of Appeals confirmed the trial court's determination that missing a scheduled appearance through inadvertence does not rise to the level of excusable neglect. In *Christy A, id*.,

the Mother in a severance trial failed to show up for trial. The Mother's excuse was she thought the trial had been postponed. The trial court stated:

> Mother has not shown excusable neglect. At best, she has shown that she believed the trial was going to be continued on December 15, 200[6]. However, she was also made aware by this Court at numerous hearings that she was required to appear at all hearings and that failure to appear could result in the consequences set forth in Form III and under [ARPJC 66(D) ].

*Christy A. v. Arizona Dept. of Econ. Sec*., *id.*, 217 Ariz. at 305, ¶ 18 , 173 P.3d at 469, ¶ 18. In our case, Defendant was notified about the mediation conference and was cautioned about the possible consequences of failing to appear. In *Christy A, id*., the Mother asserted she had been led to believe the hearing was changed by the case manager. In our case, Defendant asserted the Plaintiff confused him by filing numerous pleadings. The trial court did not find excusable neglect for the Mother in *Christy A, id*. Nor did the trial court find excusable neglect in the case before this Court.

In *Camacho v. Gardner*, 104 Ariz. 555, 558-59, 456 P.2d 925, 928-29 (1969) the Arizona Supreme Court referenced *Coconino Pulp and Paper Company v. Marvin*, 83 Ariz. 117, 317 P.2d 550 (1957) and said:

> If a judgment is acquired because of a party's mere neglect, inadvertence or forgetfulness without any reasonable excuse therefore, the judgment will not be disturbed and the neglecting party must suffer the consequences.

While in *Coconino Pulp and Paper Company, id*., the Arizona Supreme Court found excusable neglect where an attorney missed a court appearance because of a calendaring error on the part of his staff, in our case defense counsel did not assert his failure to appear was caused by a calendaring error. Instead, the error was caused because counsel apparently did not consider the import of the trial court's January 4, 2012, ruling denying Defendant's Motion To Dismiss and simply assumed the January 25, 2012, ruling for Ms. Welchlin would also apply to Defendant. Defense counsel undertook to represent three parties. When counsel represents multiple parties in litigation, counsel must take steps to keep apprised of the court's rulings for each litigant. Counsel's claim is that the litigation was confusing because Plaintiff filed numerous motions. Filing motions is not unusual in civil cases. It is counsel's responsibility to keep up to date on the status of each party counsel represents and, if counsel is confused by a court ruling, to take steps to clarify the situation.

Defendant presented no factual explanation at all as to why its neglect should be found excusable. Instead, Defendant merely asserted the fault was caused by Plaintiff. In *Gillette v. Lanier*, 2 Ariz. App. 66, 68, 406 P.2d 416, 418 (Ct. App. 1965) the Arizona Court of Appeals said:

> The question of whether a sufficient showing of excusable neglect has been made is usually within the judicial discretion of the trial court. It will not be disturbed on appeal, unless it appears that there has been an abuse of that court's discretion.

Defendant has not shown the trial court abused its discretion. Therefore, the judgment of the trial court is affirmed.

*D. Is Plaintiff Appellee Entitled To Fees And Costs On Appeal..*

Included as part of Plaintiff's responsive memorandum—p. 13—is a request for his costs and fees. This Court notes Plaintiff appeared *pro se*. As such, he is not entitled to attorneys' fees on appeal. Attorneys' fees in a contract action are governed by A.R.S. 12–341.01. Those fees are limited to attorneys' fees. A self-represented litigant is not entitled to recoup for the litigant's time under the statutory scheme created by our Legislature. Indeed, fees are denied even when the self-represented litigant is an attorney. *Lisa v. Strom*, 183 Ariz. 415, 416, 904 P.2d 1239, 1240 (Ct. App. 1995).

> It is undisputed in Arizona that when an attorney represents himself in a legal proceeding, he is not entitled to attorney's fees.

Accord, *Connor v. Cal-Az Properties, Inc*. 137 Ariz. 53, 668 P.2d 896 (Ct. App. 1983) where the Court of Appeals held:

> In Arizona, one who acts only for himself in legal matters is not considered to be engaged in the practice of law. Even though the buyers in this case were themselves all attorneys, and carried out tasks ordinarily performed by lawyers, their activities did not constitute the practice of law because they represented themselves. Thus, for the purposes of our analysis, it makes no difference that the buyers, all appearing on their own behalf, were attorneys licensed to practice law in this state.
>
> In our opinion, the presence of an attorney-client relationship is a prerequisite to the recovery of attorney's fees. The "creation of the relation of attorney and client . . . is essential to the right of an attorney to recover compensation for his services rendered." Because an attorney has no right to recover compensation in the absence of an attorney-client relationship, the corollary must necessarily be true—a party who represents himself in litigation has no right to be compensated by the payment of attorneys' fees because of the absence of an attorney-client relationship.

*Connor v. Cal-Az Properties, Inc*. *id.,* 137 Ariz. at 56, 668 P.2d at 899 [citations omitted].

Costs, however, are governed by A.R.S. § 12–342. Plaintiff is entitled to recover his costs for this action. Therefore Plaintiff is entitled to an award for the $208.00 costs of the filing fee for his response.

. . . . .

III. CONCLUSION.

Based on the foregoing, this Court concludes the Manistee Justice Court did not err when it granted Plaintiff a default judgment because Defendant failed to appear at the previously scheduled mediation conference.

**IT IS THEREFORE ORDERED** affirming the judgment of the Manistee Justice Court.

**IT IS FURTHER ORDERED** remanding this matter to the Manistee Justice Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** awarding Plaintiff judgment for $208.00 for the costs he incurred in filing his responsive memorandum**.**

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

*/s/ Myra Harris*
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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